

75-1118

Supreme Court of Kansas
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IN THE SUPREME COURT MICHAEL RODAK, JR., CLERK
OF THE UNITED STATES

DON BEN SCHOTER

Appellant

-VS-

FIRST NATIONAL BANK OF
LAWRENCE, A Corporation,
and KUHN TRUCK & TRACTOR
COMPANY, INC., A
Corporation

Appellees

Appeal from:
THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Don Benschoter, the appellant, files this statement of the bases on which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and that the Court should exercise such jurisdiction in this case.

Opinion Below

The Supreme Court of Kansas, in its opinion in Benschoter v. First National Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975), held that the provisions of K.S.A. 84-9-503, authorizing the use of self-help repossession by a secured creditor, did not violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. The judgment affirmed the initial ruling of the Douglas County District Court against the appellant.

Jurisdiction

The appeal herein is from a final judgment made and entered in the Supreme Court of Kansas. The judgment upholds the constitutionality of a state statute, to wit: K.S.A. 84-9-503. The

Supreme Court has jurisdiction to review this final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

The final judgment was rendered and filed November 8, 1975. Notice of Appeal was filed on February 5, 1976 in the Supreme Court of Kansas (a copy of which notice is set out in Appendix "D" hereto).

Statute Involved

84-9-503. Secured party's right to take possession after default. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 84-9-504.

Questions Presented

1. Whether the self-help provisions of K.S.A. 84-9-503 render the statute

constitutionally defective so that the taking of appellant's property thereunder by these appellees violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

2. Whether the authorization of self-help repossession under K.S.A. 84-9-503, as to obviate the necessity of any judicial involvement by appellees in which due process could be protected, constituted sufficient state action so as to invoke the protections of the Fourteenth Amendment?

3. Whether, under the facts of this case, the conduct of appellees in pursuing self-help repossession, as authorized by the statutes of Kansas and as sanctioned by the Supreme Court of Kansas, constituted the taking of appellant's property without due process of law?

Statement of the Case

Don Benschoter, the appellant, negotiated a loan with the First National Bank of Lawrence, Kansas, one of the appellees. The appellant signed a promissory note and security agreement secured by various items of farm equipment. The security agreement gave the Bank "the remedies of a secured party under the Kansas Uniform Commercial Code" and further provided that "upon default Secured Party (Bank) shall have the right to the immediate possession of the Collateral." The seller of the farm equipment which was pledged as security, Kuhn Truck and Tractor

Company, Inc., the other appellee, endorsed the bank note as guarantor.

After appellant was able to pay only \$500.00 of a \$900.00 payment due and unable to pay the next \$300.00 payment, Luis Kuhn, an officer of the Kuhn Company, went to the appellant's home while appellant and his wife were away from home, and prevailed upon the appellant's seventeen-year-old son to open a padlocked gate which protected the equipment. He then removed the secured property.

Appellant, in an effort to regain possession of this equipment, brought a civil action alleging trespass and conversion. The due process questions appealed herein were first presented in appellant's initial petition. They were argued before the District Court of Douglas County, Kansas in response to appellees' Motion for Summary Judgment. That court rejected appellees' due process argument in a Memorandum of Decision on January 24, 1974 (a copy of which is attached hereto as Appendix "B").

While that decision denied summary judgment on the basis that there was some question as to whether the statutory self-help provisions had been complied with, the same court, on a reconsideration of appellees' motion, subsequently granted summary judgment. That decision (a copy of which is attached hereto as Appendix "C") again summarily dismissed appellant's challenge of the statute as being an unconstitutional denial of due process in authorizing the taking of appellant's property.

Constitutional Questions
Are Substantial

The constitutional questions raised herein are substantial and concern the matter of the taking of secured personal property by a creditor employing self help and without judicial involvement pursuant to a state law that allows such self help. The state Court has held such law to be good and has found the self help provision thereof constitutionally permissible, finding no state involvement in the self help taking process.

Four recent cases decided by this Court logically reach the threshold of the questions raised here, and the issue of self help in repossession provisions of state statutes should be resolved. The four cases referred to are: Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 93 S.Ct. 177, 32 L.Ed.2d 556 (1972); Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

Many states are involved, many thousands of debtors and creditors alike await definitive guidelines, and appellant asks this Court to now say that there may be no repossession without judicial involvement and the right to a hearing if desired. Such a holding would remove

once and for all this great invitation to disorder in our society. There is no longer any justification for creditors, by stealth or otherwise, to employ self help in the repossession of personal property. And a state should not be permitted to encourage such conduct by statutorily allowing self help and then denying that the state is involved.

Conclusion

The Court should take jurisdiction of this appeal.

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No. 47,781

DON BENSCHOTER, *Appellant*, v. FIRST NATIONAL BANK OF LAWRENCE, A Corporation, and KUHN TRUCK & TRACTOR COMPANY, INC., A Corporation, *Appellees*.

SYLLABUS BY THE COURT

1. SECURED TRANSACTIONS—*Self-help Repossession Does Not Violate Due Process—State Action Not Present.* The self-help repossession provisions of K. S. A. 84-9-503 do not violate constitutional due process because no state action is present when the state passes a law which: (a) does not change the common law or previously codified statutory law; (b) does not significantly encourage and involve the state in private action; and (c) does not involve any state official in the prejudgment self-help repossession of collateral.
2. SAME—*Creditor May Repossess Collateral without Judicial Process—Breach of Peace—“Stealth” Does Not Constitute Breach of Peace.* A creditor may repossess collateral without judicial process if this can be done without breach of the peace. Standing alone, stealth, in the sense of a debtor's lack of knowledge of the creditor's repossession, does not constitute a breach of the peace.
3. SUBROGATION—*Right to Subrogation—Part Payment.* The general rule that one may not be subrogated to the rights and securities of a creditor until the claim of the creditor has been paid in full is subject to limitation. The rule against subrogation on part payment is that a creditor cannot equitably be compelled to split his securities, and give up control of any part until he is fully paid. Such rule is for the benefit of creditors, and the creditor alone can object to subrogation under partial payment, and only to the extent that it would impair his preferred rights. But the rule extends only so far as its reason goes and is never invoked to defeat obligations in the interest of the debtor alone.
4. SECURED TRANSACTIONS—*Self-help Repossession Not Unconstitutional—“Stealth” Not Breach of the Peace—Guarantor Entitled to Subrogation Rights—Summary Judgment.* In a civil action for damages arising from a creditor's self-help repossession, the trial court granted summary judgment in favor of the creditor and its guarantor. On appeal the record is examined, and for the reasons stated in the opinion it is held: (a) The self-help provisions of K. S. A. 84-9-503 are not constitutionally infirm; (b) the “stealth” asserted by the debtor in this case did not constitute a breach of the peace; (c) the guarantor of an obligation was entitled to be subrogated to the rights of the creditor against the principal; and (d) the trial court did not err in granting judgment as a matter of law in favor of the creditor and its guarantor.

APPENDIX "A"

Appeal from Douglas district court, division No. 2; JAMES W. PADDOCK, judge. Opinion filed November 8, 1975. Affirmed.

Jane B. Werholtz, of Harley & Werholtz, of Topeka, argued the cause and was on the brief for the appellant.

Richard L. Zinn, of Barber, Emerson, Six, Springer & Zinn, of Lawrence, argued the cause, and *Thomas V. Murray*, of the same firm, was with him on the brief for the appellee, The First National Bank of Lawrence.

Gerald L. Cooley, of Allen & Cooley, of Lawrence, argued the cause, and was on the brief for the appellee, Kuhn Truck and Tractor Company, Inc.

The opinion of the court was delivered by

SCHROEDER, J.: This is an appeal from an order of the trial court granting a creditor judgment thereby affirming the creditor's "self-help" repossession of the plaintiff's property (pledged as security for a loan) pursuant to K. S. A. 84-9-503. The provision of that statute in the Uniform Commercial Code pertinent to this appeal reads:

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

The facts leading to the challenged "self-help" repossession are not complicated. Don Benschoter (plaintiff-appellant) is a farmer and security guard in Lawrence, Kansas. On June 15, 1971, he negotiated a loan from Mr. Warren Rhodes, president of the First National Bank of Lawrence (hereafter referred to as the Bank). The appellant signed a \$4,096.73 promissory note and security agreement secured by various items of farm equipment: a combine, a grain drill, a hay conditioner and a cadet mower. This security agreement gave the Bank "the remedies of a secured party under the Kansas Uniform Commercial Code" and specifically provided that "upon default Secured Party [Bank] shall have the right to the immediate possession of the Collateral." The seller of the farm equipment which was pledged as security, Kuhn Truck and Tractor Company, Inc., (hereafter referred to as the Kuhn Company) endorsed the bank note evidencing the loan as guarantor.

The appellant met his payment obligations, although frequently late, until July 1, 1972. On July 1, 1972, a \$900 payment was due. The appellant paid only \$400. That \$400 payment was made to Kuhn Company who paid the \$400 plus the remaining \$500 still due to the Bank.

On September 1, 1972, a \$300 payment was due but never made. Shortly prior to this time Louis Kuhn, an officer of the Kuhn Company, had started out to the appellant's home to obtain the \$500

owed on the July 1, 1972, payment. On the way he met the appellant and discussed the \$500 owed and the approaching \$300 payment. The appellant indicated he couldn't meet Mr. Kuhn's demands that day but he might have the money on Saturday, September 2, 1972. At that time the appellant said, "if I can't get the money, I'll bring it [the farm equipment] back." The bank had previously informed the appellant that unless payments were made, Mr. Kuhn would be asked to pick up the equipment. Mr. Kuhn testified he repeated that warning saying:

" . . . Don, what are we going to work out on this equipment that you owe us for? . . . "

The appellant replied:

" . . . I'm just to the point where I don't think I can do anything. Things have gone against me, and I'm just going to have to let you have it all back. There is no way I can pay for it, there is no way I can pay for it. I'm just going to let you have it back. . . . I'll bring the equipment in to you. I can't bring it in tomorrow. I can't bring it in tomorrow, but I'll bring it in Saturday. . . . "

Mr. Kuhn said:

" . . . Don, if you don't bring the equipment in, we are going to have to come and get it. . . . "

The appellant replied:

" . . . That's all right. If I don't bring it in to you, you come on out and get it. . . . " (Emphasis added.)

On Tuesday, September 5, 1972, not having received any money from the appellant, Louis Kuhn and an employee went to the appellant's home. Both the appellant and his wife were away from the home but their three children, ages seventeen, fifteen and thirteen were home. Mr. Kuhn went to the door of the appellant's house and asked the children to let him pick up the secured farm equipment. The hay conditioner was in the driveway in front of the barn. The cadet mower was in the barn. The appellant's seventeen-year-old son opened a padlocked gate protecting the equipment and helped them get the mower from the barn. The son also gave Mr. Kuhn a carburetor which was not part of the secured property.

The appellant admits Mr. Kuhn never struck or threatened his children. But he contends the taking was without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The trial court sustained the appellees' motion for summary judg-

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ment holding: (1) The self-help provisions of K. S. A. 84-9-503 did not violate constitutional due process; (2) that no legal question existed as to whether the appellee Kuhn Company had breached the peace by the use of "stealth"; and (3) that the appellee Kuhn Company as a guarantor of the appellant's obligation to the bank was subrogated to the rights of the bank and became a secured party and thus had a right to repossess the property.

The points assigned by the appellant for review challenge each of the rulings made by the trial court.

The appellant first argues the due process requirements of the Fourteenth Amendment of the United States Constitution requires that he should have been given notice and a prior hearing. The due process clause of the Fourteenth Amendment of the United States Constitution reads:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Under this clause, state action is necessary to invoke the Fourteenth Amendment. Acts of private individuals, however discriminatory or wrongful, are outside the scope of the Fourteenth Amendment. (*Shelley v. Kraemer*, 334 U. S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836.)

The state action test is generally met when conduct formerly private becomes so entwined with governmental policies and so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action. (*Evans v. Newton*, 382 U. S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486.) The courts have never attempted the impossible task of formulating an infallible test for determining whether the state in any of its manifestations has become significantly involved in private conduct. (*Reitman v. Mulkey*, 387 U. S. 369, 378, 18 L. Ed. 2d 830, 87 S. Ct. 1627.) Only by sifting facts and weighing circumstances on a case-by-case basis can a non-obvious involvement of the state in private conduct be attributed its true significance. (*Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722, 6 L. Ed. 2d 45, 81 S. Ct. 856; and *Reitman v. Mulkey*, *supra*, at 378.)

The appellant's primary argument is that the state has passed a law which authorizes or encourages "self-help repossession" so state action must be present. But the Federal Circuit Courts have unanimously rejected this argument. (*Shirley v. State National Bank of Connecticut*, 493 F. 2d 739 [2nd Cir. 1974], cert. denied, 419 U. S. 1009, 42 L. Ed. 2d 284, 95 S. Ct. 329; *Gibbs v. Titelman*, 502

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F. 2d 1107 [3rd Cir. 1974], cert. denied, 419 U. S. 1039, 42 L. Ed. 2d 316, 95 S. Ct. 526; *James v. Pinnix*, 495 F. 2d 206 [5th Cir. 1974]; *Turner v. Impala Motors*, 503 F. 2d 607 [6th Cir. 1974]; *Bichel Optical Lab., Inc. v. Marquette Nat. Bk. of Mpls.*, 487 F. 2d 906 [8th Cir. 1973]; *Nowlin v. Professional Auto Sales, Inc.*, 496 F. 2d 16 [8th Cir. 1974], cert. denied, 419 U. S. 1006, 42 L. Ed. 2d 283, 95 S. Ct. 328; and *Adams v. Southern California First National Bank*, 492 F. 2d 324 [9th Cir. 1974], cert. denied, 419 U. S. 1006, 42 L. Ed. 2d 282, 95 S. Ct. 325.) The state courts have also unanimously rejected this contention. (*Kipp v. Cozens*, 40 Cal. App. 3d 709, 115 Cal. Rptr. 423 [1974]; *John Deere Company of Kansas City v. Catalano*, ____ Colo. ____, 525 P. 2d 1153 [1974]; *A & S Excavating, Inc. v. International Harvester Credit Corp.*, 31 Conn. Supp. 152, 325 A. 2d 535 [1974]; *Giglio v. Bank of Delaware*, 307 A. 2d 816 [Del. Ch. Ct. 1973]; *Northside Motors of Florida, Inc. v. Brinkley*, 282 So. 2d 617 [Fla. 1973]; *Hill v. Mich National Bank*, 58 Mich. App. 430, 228 N. W. 2d 407 [1975]; *Messenger v. Sandy Motors, Inc.*, 121 N. J. Super. 1, 295 A. 2d 402 [1972]; *C. L. Brown v. U. S. Nat'l. Bank*, 265 Or. 234, 509 P. 2d 442 [1973]; and *Cook v. Lilly*, 208 S. E. 2d 784 [W. Va. 1974].) Of the many federal district court decisions, only *Watson v. Branch County Bank*, 380 F. Supp. 945 (W. D. Mich. 1974) supports the appellant's argument.

One reason for the almost unanimous acceptance of self-help repossession is that 84-9-503, *supra*, did not change the common law or the previously codified statutory law. The right to peaceful self-help repossession of property under circumstances such as are here involved, far from being a right created by 84-9-503, *supra*, has roots deep in the common law. (2 F. Pollock and F. Maitland, *The History of English Law*, 574 [2d Ed. 1899], and 2 Blackstone, *Commentaries on the Laws of England*, 857-858 [4th Ed. T. Cooley, 1899].)

Prior to the enactment of K. S. A. 84-9-503, K. S. A. 58-307 (prior source, G. S. 1868, ch. 68, § 15) provided:

"In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession."

Prior cases permitted a mortgagee to use self-help to gain possession if done without a breach of the peace. (*Motor Equipment Co. v. McLaughlin*, 156 Kan. 258, 133 P. 2d 149; and *Kaufman v. Kansas Power & Light Co.*, 144 Kan. 283, 58 P. 2d 1055.) Therefore, K. S. A.

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84-9-503 injects no new element upon which a finding of state action may be based.

Had K. S. A. 84-9-503, *supra*, changed our law, a finding of state action would still not be required. (*Adams v. Southern California First National Bank*, *supra*, and *Gary v. Darnell*, 505 F. 2d 741 [6th Cir. 1974].) Statutes regulate many forms of private activities in some manner or another. Subjecting all behavior that conforms to some statute to complete due process guarantees would emasculate the state action concept and create chaos in our society. (*Adams v. Southern California First National Bank*, *supra*, at 330, 331; and *Gibbs v. Titelman*, *supra*, at 1112.) Recent United States Supreme Court cases have held that conforming to some state regulation is not sufficient state action to trigger application of the Fourteenth Amendment. (*Moose Lodge No. 107 v. Ivis*, 407 U. S. 163, 32 L. Ed. 2d 627, 92 S. Ct. 1965 [conforming to liquor regulations]; and *Jackson v. Metropolitan Edison Co.*, 419 U. S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 499 [conforming to utility tariffs].) The same is true when a creditor conforms to 84-9-503, *supra*; no state action is present.

The appellant relies on *Reitman v. Mulkey*, *supra*, in attempting to find state action. That case dealt with racial discrimination in the sale and rental of property. Previously, California had adopted legislation prohibiting discrimination in the sale and rental of property. Later, a constitutional amendment was enacted which provided that neither the State of California nor its agents or subdivisions could prevent a person from selling or renting his property to whomever he chose. The effect of the amendment was to overturn the prior anti-discrimination statutes. The United States Supreme Court held the amendment operated to significantly encourage and involve the state in private discrimination. As such, state action was present and the amendment held unconstitutional. The appellant argues 84-9-503, *supra*, encourages private action. Yet, *Reitman* and 84-9-503, *supra*, are distinguishable.

A primary basis for distinction is the fact *Reitman* deals with racial discrimination, a consideration not present here. The historical and fundamental purpose of the Fourteenth Amendment—to eradicate racial discrimination—is not involved in creditors' rights cases. As stated by Judge Friendly's concurrence in *Coleman v. Wagner College*, 429 F. 2d 1120 (2d Cir. 1970):

" . . . [R]acial discrimination is so peculiarly offensive and was so much a prime target of the Fourteenth Amendment that a lesser degree of involve-

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ment may constitute 'state action' with respect to it than would be required in other contexts. . . ." (p. 1127.)

(See also, *Kirksey v. Theilig*, 351 F. Supp. 727 [D. Colo. 1972]; *Adams v. Southern California First National Bank*, *supra*; and *Grafton v. Brooklyn Law School*, 478 F. 2d 1137, 1142 [2nd Cir. 1973].)

Second, *Reitman* involved a change in the existing law. Here there has been no change in the law of repossession as previously indicated.

Third, *Reitman* dealt with a state constitutional amendment which "encouraged" private action. The general question of whether a state statute, authorizes, establishes, or encourages private action is explored in Burke and Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. Cal. L. Rev. 1003 (1973), and 47 S. Cal. L. Rev. 1 (1973). The authors concluded, after discussing *Reitman* and other cases, that a state statute which authorizes and thereby arguably encourages private conduct does not automatically render that conduct state action.

For example, K. S. A. 77-109 indicates the common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state. Had 84-9-503, *supra*, not existed, surely the appellant would not contend that passage of this statute giving force to the common law right of repossession meant state action was present.

Similarly, the appellant could not successfully argue this state's previous judicial decisions, such as *Motor Equipment Co. v. McLaughlin*, *supra*, and *Kaufman v. Kansas Power & Light Co.*, *supra*, which permitted self-help repossession, change the former private action to state action. The state acts in deciding a case, but its decisional law which may encourage private action does not automatically become action colorable under the Fourteenth Amendment. Such a ruling would convert the doctrine of *stare decisis* into a vehicle to open all private orders for due process review.

In summarizing and explaining their conclusion that mere authorization and resulting encouragement does not necessarily result in private action becoming state action, Burke and Reber state:

"In determining whether fourteenth amendment state action is present, the focus should always be upon the actual impact of the state law upon the choice to engage in the private conduct. Unless the state law dictates the choice to be made by the party or in some way significantly interferes with the free exercise

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of that choice, the private conduct and state law are not subject to constitutional restraints under the fourteenth amendment. State laws of a permissive character which authorize private conduct, and because of such authorization perhaps also encourage such conduct, do not satisfy the fourteenth amendment's state action requirement. To adopt 'authorization' or 'encouragement' in this context as a relevant state action inquiry would subject virtually every form of private ordering pursuant to state statutory, executive and judicial law to constitutional review in the federal courts. . . ." (p. 1109.)

Under this analysis, K. S. A. 84-9-503 cannot be said to significantly encourage and involve the state in private action.

Appellant further relies on several of the more modern creditors' rights cases. *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (prejudgment garnishment of wages); and *Fuentes v. Shevin*, 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (prejudgment replevin statute). These decisions of the United States Supreme Court reversed state laws which allowed state agents, the state court in *Sniadach* and the sheriff in *Fuentes*, to seize property without prior notice and prior hearings.

Here no state official, be he judge, clerk of the court or police officer, is involved in the prejudgment self-help repossession of the collateral. As such no state action is present. *C. L. Brown v. U. S. Nat'l Bank*, supra. Even *Fuentes* recognized this when it noted:

"The creditor could, of course, proceed without the use of state power, through self-help, by 'distaining' the property before a judgment. . . ." (p. 79, n. 12.)

The exact nature of the due process guarantees in creditors' rights cases is not clear. (Compare *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895, with *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719.) However, that does not concern us here because no state action is present.

Only *Watson v. Branch County Bank*, 380 F. Supp. 945 (W. D. Mich. 1974) presently supports the appellant. That case may be distinguished from the case at bar as involving automobile repossession and state "ratification" of private action by transferring title to the repossessed automobile. However, many of the Federal Circuit Court cases heretofore cited are factually analogous to *Watson*, suggesting it may have a short life. Some cases have acknowledged *Watson's* existence, but refuse to adopt its reasoning. (*King v. So. Jersey Nat. Bank*, 66 N. J. 161, 169, 330 A. 2d 1, 5 [1974].) Even subsequent Michigan state appellate court opinions

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do not find *Watson* persuasive. (*Hill v. Mich National Bank*, 58 Mich. App. 430, 228 N. W. 2d 407 [1975].)

The appellant suggests that the better course of action would be for the bank and other secured parties to institute legal proceedings pursuant to K. S. A. 84-9-503, under which "the secured party" may "proceed by action." However, that is not necessary. The secured party may choose the remedy it wishes; either self-help repossession or judicial action in accordance with the due process guarantees of the Fourteenth Amendment.

Commentaries on the practical and economic aspects of self-help repossession make a strong argument that absent self-help repossession credit would be more restricted or would cost more or both. (Mentschikoff, Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis, 14 Wm. & Mary L. Rev. 767 [1973]; Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S. Cal. L. Rev. 82 [1973]; and White, The Abolition of Self-Help Repossession: The Poor Pay Even More, 1973 Wis. L. Rev. 503.)

Debtors are not without remedy. If the bank or secured party repossesses before default, or breaches the peace during repossession after default, it may be liable for damages. (*Klingbiel v. Commercial Credit Corporation*, 439 F. 2d 1303 [10th Cir. 1971]; *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96 [Fla. App. 1973]; and *Jerman v. Superior Court*, 245 C. A. 2d 852, 54 Cal. Rptr. 374 [1966].) (See also, K. S. A. 84-9-507 and Annot., 35 A. L. R. 3d 1016 [1971].)

A default having been established, the next question is whether the Kuhn Company has committed a breach of the peace in the process of its repossession.

The appellant contends the appellees took repossession of the secured property by "stealth" and thereby committed a "breach of the peace" under the facts in this case. The appellant asserts that the Kuhn Company used "stealth" to effect the repossession because the repossession occurred without the appellant's knowledge and, arguably, at a time when the Kuhn Company knew the appellant would not be at his place of residence. The deposition testimony of the parties submitted to the court for consideration upon the motion for summary judgment fails to bear out the appellant's contention that appellees knew the appellant would not be home. In fact, the appellant's deposition testimony tends to establish the contrary. To support the appellant's assertion that "stealth" is part of a breach of the peace the appellant argues it should be defined

to cover, without more, a repossession that is effected without the debtor's knowledge. The appellant places primary reliance on *Motor Equipment Co. v. McLaughlin*, *supra*, a case dealing with fraud and duress which is not present here, but a case which at one point quotes 14 C. J. S., Chattel Mortgages, § 185, which says in part:

" . . . The mortgagee must not take possession by the use of force, threats, or violence, nor, it has been held, by the use of fraud or *stealth*. . . ." (p. 270.) (Emphasis added.)

(See 15 Am. Jur. 2d, Chattel Mortgages, § 122 and Annot., 45 A. L. R. 3d 1233, 1246, announcing same rule.)

Here Mr. Benschoter had knowledge that the property might be taken. He had received repeated warnings from the bank and the Kuhn Company, and he *agreed to the taking of repossession upon his continued default after Saturday, September 2, 1972*. Thus the appellees had permission to be on the property, both from the appellant and his seventeen-year-old son at the time of their entry. Had the seventeen-year-old son refused to let the appellees repossess (*Morris v. Bk. & Tr. Co.*, 21 Ohio St. 2d 25, 254 N. E. 2d 683 [1970]), or had he requested the appellees to wait until his father returned, a different case might be presented. (*Luthey v. Philip Werlein Co.*, 163 La. 752, 112 So. 709 [1927].)

Although *Motor Equipment Co. v. McLaughlin*, *supra*, suggests that fraud or stealth may vitiate an otherwise valid repossession, the facts are wholly inapplicable to the instant case. There the secured creditor not only obtained its chattel mortgage by duress, but it effected repossession:

" . . . [O]ver the protest of appellee and by force. Appellee's attorney was pushed aside after he had protested to the removal of the property and had closed the door. The door was reopened and the property was removed by a large crew of appellant's men. . . ." (p. 269.)

The question before the court was not, therefore, whether the repossession was effected by stealth, but rather whether the secured creditor was authorized to take and remove the property from the debtor's place of business by actual force.

As a matter of law this court cannot say "stealth," as the term is used in the context of this case by the appellant, constitutes a "breach of the peace." Tracing the language used in the *Motor Equipment Co.* case to its cited authority, only *Wilson Motor Co. v. Dunn*, 129 Okla. 211, 264 Pac. 194 (1928) and other Oklahoma cases subsequent to *Wilson* seem to support the stealth concept. However, stealth, in the sense of the debtor's lack of knowledge of the

creditor's repossession, does not make an otherwise lawful repossession an unlawful repossession in Oklahoma. (*Kroeger v. Ogsden*, 429 P. 2d 781 [Okla. 1967]; *General Motors Acceptance Corp. v. Vincent*, 183 Okla. 547, 83 P. 2d 539 [1938]; and *First National Bank & Trust Co. v. Winter*, 176 Okla. 400, 55 P. 2d 1029 [1936].)

White and Summers in their Handbook of the Law under the Uniform Commercial Code (West Publishing Co., 1972, pp. 966-975), discuss the essential requirement that repossession be peaceful and what constitutes a breach of the peace, as follows:

" . . . To determine if a breach of the peace has occurred, courts inquire mainly into: (1) whether there was entry by the creditor upon the debtor's premises; and (2) whether the debtor or one acting on his behalf consented to the entry and repossession." (p. 967.)

Using this basis for an analysis the trial court correctly found there was no breach of the peace in this case. (*Northside Motors of Florida, Inc. v. Brinkley*, *supra*; *Harris Truck & Trailer Sales v. Foote*, 58 Tenn. App. 710, 436 S. W. 2d 460 [1968]; and Annot., 99 A. L. R. 2d 358 [1965].)

The question remains whether the appellee Kuhn Company, the party that physically repossessed the equipment, was subrogated to the rights of the bank and thus able to take advantage of the protection given self-help repossession by 84-9-503, *supra*. After making the August 9, 1972, payment, Kuhn Company, as guarantor of the note and security agreement became subrogated to the rights of the bank as a secured party. The Uniform Commercial Code provides that a guarantor is also a surety. (L. 1975, ch. 514, § 2 [40] [K. S. A. 84-1-201 (40)].) The code also provides:

"A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. . . ." (L. 1975, ch. 514, § 34 [5] [K. S. A. 84-9-504 (5)].)

When a surety performs under his guaranty, he is subrogated to the rights of those to whom he responds. (*United States Fidelity & Guaranty Co. v. Maryland Cas. Co.*, 186 Kan. 637, 352 P. 2d 70; and *Mountain Iron & Supply Co. v. Jones*, 201 Kan. 401, 441 P. 2d 795.) In the *Mountain Iron & Supply Co.* case the rule on subrogation was stated as follows:

"Kansas follows the rule that when a guarantor of an obligation is called upon by the creditor to pay the indebtedness, the guarantor or surety is entitled to be subrogated to the rights of the creditor against the principal. . . ." (p. 408.)

The appellant contends the Kuhn Company was not subrogated to the bank's rights under the note and security agreement at the time the appellant's property was repossessed because the Kuhn Company had not paid the full amount of the note to the bank until September 29, 1972. Kansas law is contrary to the appellant's position. In *United States Fidelity & Guaranty Co. v. Maryland Cas. Co.*, supra, the rule is stated:

"The general rule that one may not be subrogated to the rights and securities of a creditor until the claim of that creditor has been paid in full is subject to limitation. The rule against subrogation on part payment is that a creditor cannot equitably be compelled to split his securities, and give up control of any part until he is fully paid. Such rule is for the benefit of creditors, and the creditor alone can object to subrogation under partial payment, and only to the extent that it would impair his preferred rights. But the rule extends only so far as its reason goes and is never invoked to defeat contract obligations in the interest of the debtor alone." (Syl. ¶ 3.)

Here the record discloses no objection was made by the bank concerning the Kuhn Company's right of subrogation upon partial payment. Rather the record indicates that Louis Kuhn was instructed or requested, or would be instructed or requested, to repossess the security because of the appellant's continued default under the note. Therefore, we are compelled to uphold the finding of the trial court that the appellee Kuhn Company was subrogated to the rights of the bank and thus able to take advantage of the "self-help" repossession provisions of K. S. A. 84-9-503.

On the record presented the appellees are entitled to judgment as a matter of law. The judgment of the trial court is affirmed.

MILLER, J., not participating.

A P P E N D I X " B "

Trial Court's
Memorandum of Decision
January 24, 1974

On December 14, 1973, defendants' motions for summary judgment were presented to the court upon oral arguments and briefs. The motions were taken under advisement.

The Court in determining the motions was required to search the record to determine if any factual issues exist and if any genuine issue of material fact are found. Secrist v. Turley, 196 Kan. 576, 412 P.2d 976. The court must resolve against the movants when any doubt exists whether there remains a genuine issue of material fact, and the evidentiary material presented by the party opposing the motion must be taken as true and he must be given the benefit of all reasonable inferences therefrom. Weber v. Southwestern Bell Telephone Co., 209 Kan. 273, 497 P.2d 118.

The court is of the opinion that such doubt exists in regard to the question as to whether the repossession by Mr. Kuhn was performed in a legal manner. In this regard the court is of the opinion that the "self help" provision of K.S.A. 84-9-503, although allowing the creditor to go upon the premises of the debtor to repossess the security, (69 Am.Jur.2d Secured Transactions, sec. 595) is limited to that the secured party must not take possession by the use of force, threats

or violence, nor "by the use of fraud or stealth". Motor Equipment Co. v. McLaughlin, 156 Kan. 258, 133 P.2d 149. The issue for trial in determining the legal manner of the repossession is whether Mr. Kuhn obtained the repossession by stealth, that is, by secret procedure or action. Put in another way, there is an issue as to whether he purposefully went to plaintiff's residence when he knew plaintiff was not at home in order to repossess the security in his absence. In this regard, the question of consent of plaintiff becomes important and this too is a disputed genuine issue of material fact as is the question of defendant Kuhn being an agent of defendant Bank.

The defendants' motions are therefore overruled.

Questions of law defined in defendants' motions and capable of solution at this time are resolved as follows:

1. The "self help" provision of K.S.A. 84-9-503 does not violate due process requirements of the Constitution. Repossession by self help is an alternate method allowed, but not required, a creditor to obtain security upon default. The self help provisions of the statute codifies the creditor's rights under common law and does not involve state action held objectionable by the Fuentes decision. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983; Adams v. Southern California First National Bank, No. 72-1487, (CA9, Oct. 4, 1973); Bichel Optical Laboratories v. Marquette Natl. Bank of Minneapolis, No. 73-1330 (CA8,

Nov. 7, 1973). See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163 indicating that "state action" could not be found unless the state had significantly involved itself.

2. The defendant Kuhn as a guarantor of plaintiff's obligation to defendant Bank was subrogated to the rights of the bank and became a secured party to the extent of the July, 1972, payment and had the right to repossess the property in question. K.S.A. 84-9-504(c); K.S.A. 84-1-103. The only party who could object to defendant Kuhn exercising its rights as a secured party to repossess the security under the subrogation statute would be defendant Bank. United States Fidelity & Guaranty Co. v. Maryland Casualty Co., 186 Kan. 637, 352 P. 2d 70.

Dated this 24th day of January, 1974.

/s/ James W. Paddock
District Judge

A P P E N D I X " C "

Trial Court's
Memorandum of Decision
April 10, 1974

This matter is again before the court on defendants' motion to reconsider the court's prior ruling.

On January 24, 1974, the court in ruling on defendants' motion for summary judgment indicated that if defendant Kuhn, by its agent, purposefully went to plaintiff's residence when it was known plaintiff was not at home in order to repossess the security in his absence, then defendant Kuhn would have wrongfully repossessed the property. The court indicated in its opinion that such action, if shown to exist, would constitute "stealth" which would or could result in a breach of the peace.

A review of the annotation in 99 ALR 2d 358 and cases cited therein affirms the court's opinion that the repossession of property by a secured party by means of stealth could constitute action that could be, or could in likelihood lead to, a breach of the peace.

The court did however err in its ruling on what would constitute stealth. Even plaintiff's citations indicate stealth not only includes a lack of knowledge on the part of the victim, but also the secret, surreptitious, clandestine or furtive acts or behavior of the repossession. The mere lack of knowledge or lack of consent of the debtor in the

creditors repossessing the security is not repossession by stealth. G.M.A.C. v. Vincent, 183 Okla. 400, 83 P.2d 539. Stealth, in the legal sense, would constitute acts that have the characteristics of theft or robbery. Wilson Motor Co. v. Dunn, 129 Okla. 211, 264 Pac. 194.

If in fact Kuhn had gone to plaintiff's home to repossess the property knowing plaintiff was not at home, the undisputed facts of this case show his action and behavior was not those that would constitute stealth.

A further review of the record would indicate that the following facts are either not disputed or, in the event a dispute exists, are resolved in plaintiff's favor for purposes of reconsideration of defendants' motion for summary judgment.

1. On June 15, 1971, plaintiff executed a note and security agreement to defendant bank for \$4,096.73 with interest at 9% per annum. The security agreement granted defendant bank a security interest in the following described personal property:

1971 New Holland No. 490 Hay Conditioner

- (1) Dempster grain drill
- (1) I.H.C. 71 Cadet No. 170577 with 38 inch mower
- (1) I.H.C. 101 Combine with corn and grain heads

2. Plaintiff paid \$100.00 on the note and the balance of \$3,996.73 was to be paid in the amounts, plus interest, and on the dates as follows:

8-15-71	\$300.00
11-20-71	400.00
7- 1-72	900.00
9- 1-72	300.00
9- 1-73	300.00
7- 1-74	896.73

3. The security agreement provided that upon default the secured party shall have the right to immediate possession of the security and, either upon default or if it deems itself insecure, the secured party shall have the remedies of a secured party under the Kansas Uniform Commercial Code.

4. The defendant Kuhn endorsed the note as a guarantor pursuant to K.S.A. 84-3-416 guaranteeing the payments to defendant bank. Defendant Kuhn's endorsement was placed on the back of the note and security agreement, at the bottom thereof, after execution of the note and security agreement by plaintiff without his knowledge. No other additions or changes were made in said note and security agreement.

5. Plaintiff made the first two payments as specified by the note and was current in payments through June, 1972. The initial two payments, although late, had been accepted by defendant bank with late charges or interest added to the required payment.

6. The payment of \$900.00 and interest due July 1, 1972, was not paid by plaintiff, but during the month of July, 1972, plaintiff paid \$400.00 to defendant Kuhn who in turn paid the \$400.00 to defendant

Bank on July 18, 1972. At the time plaintiff made the \$400.00 payment to defendant Kuhn, plaintiff informed an officer of defendant Kuhn that when he got back to work he would get the payment to defendant Kuhn. The officer of defendant Kuhn told plaintiff this was all right as long as he got the payment to him.

7. On demand of defendant Bank, defendant Kuhn on August 9, 1972, paid the remaining \$500.00 and interest due on the July 1, 1972 payment to defendant Bank. Plaintiff did not reimburse defendant Kuhn for this payment.

8. The \$300.00 payment and interest due September 1, 1972, was not paid by plaintiff.

9. On July 27, 1972, defendant Bank sent plaintiff a letter to the effect that unless the July 1, 1972, payment was made in full on or before August 2, 1972, defendant Kuhn was instructed to pick up the equipment.

10. On or about August 31, 1972, Louis Kuhn an officer of defendant Kuhn started out to plaintiff's home to either obtain the money owed defendant Kuhn or to pick up the equipment securing the note. On the way he passed plaintiff going in the opposite direction toward town. Kuhn turned and followed plaintiff to the parking lot of Kansas Color Press where plaintiff's wife was employed. A discussion took place between plaintiff and Kuhn concerning plaintiff making payments or returning the security. Plaintiff's version of this conversation was that if

plaintiff couldn't get the money he would bring the security back, and if he didn't get the money by the following Saturday, he might bring it in on Saturday.

11. Plaintiff made no payment nor did he bring in the equipment and was in default on the September, 1972 payment. Kuhn and one Fremont Hornberger went to plaintiff's home on the afternoon of September 5, 1972, between 3:30 and 4:30 p.m. Plaintiff and his wife were not at home. The plaintiff's two sons, ages 17 and 13, and a daughter, age 15, were at the house. Kuhn went to the door of plaintiff's house and asked the children to let him pick up the equipment. Neither Kuhn or Hornberger used any threats or violence, nor were the children physically touched. No threatening language was used against them.

12. The hay conditioner was in the driveway in front of the barn. The Cadet mower was in the barn. Plaintiff's sons helped Kuhn get the Cadet mower and the hay conditioner. A carburetor was not on the mower and Kuhn picked up a carburetor lying near the mower that turned out to be off a motor scooter that belonged to plaintiff's son.

13. On September 5, 1972, Kuhn did not have to pass through any enclosure getting from the road to plaintiff's house.

The following claims made by plaintiff will be reviewed and the entire record searched to determine if there is any issue as to a material fact, and if not defendants are entitled to judgment as a matter of law.

1. The security agreement of June 15, 1971, between plaintiff and defendant Bank was modified by an oral agreement made during the month of July, 1972. In this regard plaintiff claims that the modification occurred at the time plaintiff paid \$00.00 (sic) to defendant Kuhn as a partial payment of the \$900.00 payment that was due July 1, 1972, and Kuhn told plaintiff to pay the balance to defendant Kuhn. In the event defendant Kuhn was acting in its own behalf and not as the bank's agent, an officer of defendant Kuhn could not as a matter of law modify a contract between plaintiff and defendant Bank. In the event defendant Kuhn was the agent of defendant Bank, the statement by its officer for plaintiff to make the balance of payments to defendant Kuhn could not create any modification that would result in plaintiff not being in default in payments on September 5, 1972.

Plaintiff states that defendant Kuhn's officer, when told by plaintiff that he would get the payment to defendant Kuhn when he got back to work, stated it was all right as long as he got the payment to him. In such event if defendant Kuhn through its officer was acting as agent for defendant Bank, such statement could not as a matter of law amount to an oral contract that could modify the contract between plaintiff and defendant Bank if it was not supported by consideration. Plaintiff makes no claim that additional consideration passed between him and Kuhn other than the conversation reported in his deposition, nor can the existance (sic) of such fact be reasonably inferred.

Arensman v. Kitch, 160 Kan. 783, 167 P.2d 441; 17 Am.Jur.2d Contracts, sec. 469. The granting of an additional period of time in which to make a past due payment, standing alone, does not constitute consideration. 17 Am.Jur.2d Contracts Sec. 474-481.

In plaintiff's deposition plaintiff made reference to the guarantee of Kuhn endorsed on the security agreement as constituting a modification thereof. The endorsement of Kuhn as a guarantor on the security agreement did not modify plaintiff's agreement with defendant Bank.

2. In the event defendant Kuhn was not an agent of defendant Bank, Kuhn had no right as guarantor to repossess the equipment. In this regard there is no issue as to the fact that defendant Kuhn paid defendant Bank the \$500.00 balance due on the July, 1972, payment on or about August 9, 1972. As indicated in the January 24, 1974, memorandum, defendant Kuhn as guarantor of plaintiff's obligation to defendant Bank became subrogated to the rights of the Bank as a secured party to the extent of the balance of the July, 1972, payment and as between defendant Kuhn and plaintiff had the right to repossess the property. K.S.A. 84-9-504(c); K.S.A. 84-1-103; United States Fidelity & Guarantee Co. v. Maryland Casualty Co., 186 Kan. 637, 352 P.2d 70.

Since the parties to this action agree that the payment due September 1, 1972, was not made by plaintiff to either defendant Bank or to defendant Kuhn then

defendant Kuhn, if he were acting on September 5, 1972, as the Bank's agent, would by the terms of the security agreement, be authorized to repossess the equipment for the Bank.

3. The repossession was effected by defendants in an unlawful manner. As to this claim the initial determination is whether there is an issue as to any material fact as to the manner of repossession. If there is no issue as to fact, then a determination of legality as a matter of law would make a further determination of the existence of a principal-agent relationship between defendant Bank and defendant Kuhn of no importance. On the other hand a determination of either illegality of repossession or that there exists an issue of material fact as to the legality of the repossession would make the agency relationship a material issue in the case.

A. In regard to plaintiff's claim that "self-help" provision of K.S.A. 84-9-503 violates due process requirements of the Constitution, the court affirms its conclusions in that regard as set out in paragraph numbered 1 in its Memorandum of Decision of January 24, 1974, in holding that such provision does not violate due process requirements.

B. The issues that exist in regard to the repossession of the equipment in this case are issue of law rather than of fact. There is no claim made by plaintiff that Kuhn and Hornberger used force or threats in obtaining repossession of the equipment. Plaintiff's deposition and

statements of plaintiff's counsel at pre-trial have admitted no threats, violence, physical touching or threatening language was used. Plaintiff contends however that defendant Kuhn's officer had to have consent in order to go upon his property to repossess the equipment. He further contends that plaintiff did not give such consent and that plaintiff's 17 year old son could not, as a matter of law, consent.

The provision of K.S.A. 84-9-503 would allow a secured party to enter the debtor's premises to effect repossession of the collateral as long as there is no breach of the peace. 69 Am.Jur.2d Secured Transactions sec. 595. The absence of consent alone does not constitute a breach of peace. It is only where the debtor or the person in charge at the residence objects to the "self help" repossession that resort to legal process is required. 69 Am.Jur.2d Secured Transactions sec. 594. Plaintiff makes no claim that the repossession in this case was resisted or that the request made by Kuhn to pick up the equipment at plaintiff's residence was refused, nor can such claim be inferred from any deposition testimony in the case.

The opening of the barn by plaintiff's son to allow Kuhn and Hornberger to enter and their entry and removal of the Cadet mower cannot be said to constitute a conversion, trespass, or a breach of the peace absent force or threats on their part.

C. The plaintiff claims that he was the owner of a Cushman Motor Scooter

carburetor that was taken by Kuhn when repossessing the Cadet mower. His deposition testimony stated that the motor scooter belonged to his son. Any cause of action in such case would be that of the son.

The search of the record reveals the only factual issues that may exist is that of principal-agent relationship between defendants Bank and Kuhn. The determination of legal issues show the issue of fact is not a material one and that defendants are entitled to judgment as a matter of law. (See Weber v. Southwestern Bell Telephone Co., 209 Kan. 273 at 281-282)

The Clerk of this court shall enter the following judgment:

The defendants' motions to reconsider the decision of the court of January 24, 1974, is granted and upon reconsideration it is the judgment of the court that defendants' motions for summary judgment be sustained.

/s/ James W. Paddock
District Judge

A P P E N D I X " D "

Notice of Appeal to The
Supreme Court of the United States

Notice is hereby given that Don Ben-schoter, the appellant above-named, hereby appeals to the Supreme Court of the United States from the complete opinion and final decision of the Supreme Court of Kansas upholding the constitutionality of K.S.A. 84-9-503, entered in this action on November 8, 1975.

This appeal is taken pursuant to Title 28, United States Code, §1257, subparagraph 2.

Dated: February 5, 1976.

FILED

/s/ Robert E. Tilton
/s/ Fred W. Phelps

FEB 5 - 1976

Attorneys for
Appellant.

LEWIS C. CARTER
CLERK SUPREME COURT

Certificate of Service

I hereby certify that a conformed copy of the above and foregoing "Notice of Appeal to the Supreme Court of the United States" was regularly mailed on this 5th day of February, 1976, to the following:

1. Richard L. Zinn, Esq. of BARBER,
EMERSON, SIX, SPRINGER & ZINN, Lawrence
National Bank Building, Lawrence, Kansas
66044, attorney for appellee The First
National Bank of Lawrence; and,

2. Gerald L. Cooley, Esq., of ALLEN
& COOLEY, First National Bank Building,
Lawrence, Kansas 66044, attorney for
appellee Kuhn Truck and Tractor Company,
Inc.

/s/ Robert E. Tilton
/s/ Fred W. Phelps

Attorneys for
Appellant.

APPENDIX "E"

FILED

FEB 5 - 1976

LEWIS C. CARTER
CLERK SUPREME COURT

Proof of Service

Affidavit of Mailing

State of Kansas)
)SS
County of Shawnee)

The undersigned, Fred W. Phelps, of lawful age, and being first duly sworn upon his oath, deposes and says:

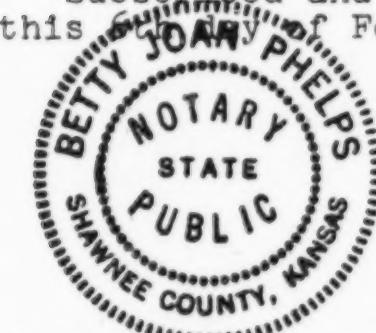
That he is a member of the Kansas bar, and co-counsel herein; that he did on the 6th day of February, 1976, cause to be regularly mailed three (3) printed copies of the jurisdictional statement herein, by depositing same in the United States Post Office at Topeka, Kansas, first class postage prepaid, addressed to all adverse counsel of record herein as follows:

1. Richard L. Zinn, Esq. of BARBER, EMERSON, SIX, SPRINGER & ZINN, Lawrence National Bank Building, Lawrence, Kansas 66044 (attorney for appellee The First National Bank of Lawrence), and;

2. Gerald L. Cooley, Esq. of ALLEN & COOLEY, First National Bank Building, Lawrence, Kansas 66044 (attorney for appellee Kuhn Truck and Tractor Company, Inc.).

Fred W. Phelps
FRED W. PHELPS

Subscribed and sworn to before me this 6th day of February, 1976.



Betty Joany Phelps
BETTY JOAN PHELPS
Notary Public

My Commission expires: June 5, 1978.